A

Cypark Sdn Bhd v KNM Process Systems Sdn Bhd and other appeals

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(C)(A)-551–03 OF 2020, B-02(C)(A)-553–03 OF 2020, B-02(C)(A)-579–04 OF 2020 AND B-02(C)(A)-581–04 OF 2020

KAMALUDIN MOHD SAID, CHE MOHD RUZIMA AND AHMAD ZAIDI JJCA

C 1 MARCH 2024

Arbitration — Award — Finality of arbitration proceedings — Whether arbitral tribunal sole arbiter of dispute between parties — Whether court lacked power to grant final relief — Whether court could order declarations and damages pursuant to s 11(1) of Arbitration Act 2005 ('AA') — Whether final relief should only be given by arbitral tribunal in form of final award and not by court

D

Civil Procedure — Injunction — Interim injunction — Application for interim injunction pending arbitration — Plaintiff applied for interim injunction to restrain defendant's rights under two bank guarantees — Whether court could grant injunctions pending issuance of final award — Whether court could impose conditions pertaining to injunctions — Whether court should grant stay of execution of condition pending disposal of appeal — Whether tests for injunction to be granted fulfilled — Whether courts could only grant interim measures and not permanent or final relief pursuant to word 'interim measure' under s 11(1) of AA — Whether final relief could only be granted by arbitral tribunal

E

F

Civil Procedure — Originating summons — Parties — Non-joinder of parties — Whether plaintiff could file originating summons without joining another party to contract as co-plaintiff — Whether defendant would suffer prejudice

G

H The plaintiff ('KNM Process System') and Hitachi Zosen Corp of Japan ('Hitachi') formed a Consortium named SHK Consortium ('Consortium'). The Consortium was awarded a contract by the defendant ('Cypark Sdn Bhd') for the procurement, construction and commissioning of a solid waste treatment and management plant in Negeri Sembilan ('the contract'). Under the contract: (a) the plaintiff was responsible for the 'on-shore portion' of the contract whilst Hitachi was responsible for its 'off-shore portion'; and (b) the Consortium was required to provide two bank guarantees ('BGs') to the defendant, namely: (i) an 'advance payment guarantee' ('APG') in a sum of RM13.3m; and (ii) a 'performance guarantee' ('PG') for an amount of RM13.3m. The contract also provided for an arbitration clause whereby

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parties agreed that all disputes under the contract shall be determined by way of arbitration. During excavation works, the plaintiff encountered shallow hard rock at the worksite which prevented it from proceeding with works and causing delay to the works as per scheduled. The plaintiff notified the defendant of the hard rock issue and applied for an extension of time ('EOT') but was refused by the defendant. The defendant then imposed damages for the delay totalling RM12.15m ('delay damages'). The plaintiff disputed the defendant's claim for the delay damages. Hence, the Consortium decided to suspend works under the contract ('suspension notice'). It was the plaintiff's contention that due to the delay damages, the plaintiff could not pay its sub-contractors, suppliers and consultants. Following that, the plaintiff entered into an 'additional advance arrangement' with the defendant ('arrangement') wherein the defendant paid a sum of RM1,747,791.42 to the plaintiff, the sum of which was paid directly to the plaintiff's subcontractors, suppliers and consultants as per under the arrangement. Consequently, the defendant claimed that the suspension of works by the plaintiff tantamount to a breach of the contract by the Consortium. The defendant, therefore, terminated the contract, closed the worksite and issued calls on the two BGs. Flowing from the calls, the plaintiff commenced originating summons ('OS') whereby, vide encl 1, the plaintiff applied for a declaration that the calls made were unconscionable and for an injunction to restrain the defendant from receiving proceeds of the called BGs pending disposal of arbitration proceeding between the parties. Pending the determination of encl 1, vide encl 3 the plaintiff, pursuant to s 11(1)(a) and/or (b) of the Arbitration Act 2005 ('the AA') applied ex parte for an injunction to restrain the defendant from making any call on the two BGs or alternatively, from receiving any proceeds from the called BGs. The HCJ allowed both encls 1 and 3. Dissatisfied, the defendant appealed against the decisions and filed encls 28 seeking an order that the plaintiff extend the validity and enforceability of the two BGs up until three months after the final disposal of the defendant's appeals, failing which the injunctions and declaration (unconscionability) shall be deemed to be discharged. The defendant also filed encl 35 praying for reliefs similar to that of encl 28, save for, that the validity and enforceability of the two BGs be extended until three months after the final arbitration award between the parties, failing which the two injunctions and declaration shall deemed to be discharged and pending the issuance of the final award, both parties shall have liberty to apply to this court for any further order. The High Court allowed encls 28 and 35. Aggrieved, by the decisions of the High Court, both the plaintiff and defendant appealed. In respect of encls 28 and 35, Appeal 551 and Appeal 552 were respectively filed by the plaintiffs. Whilst in respect of encls 1 and 3, Appeal 579 and Appeal 581 were filed by the defendant. The issues that arose for determination were: (A) whether the court could order declarations and/or damages under s 11(1) of the AA; (B) whether the plaintiff could file the OS without including Hitachi as a co-plaintiff; (C) whether the court could and should grant the injunctions pending the issuance of the final award; (D) if

A the court granted the two injunctions pending the issuance of the final award, could and should the court impose condition; and (E) whether pending the disposal of the plaintiff's appeals, the court should stay the execution of the condition.

B **Held**, dismissing appeals:

(1) The HCJ correctly viewed that the court's power to grant interim measures was confined to any one or more of s 11(a) to (e) of the AA and that the use of the word 'may' showed that the court had a discretion to
C grant any 'interim measure', 'before or during arbitral proceedings' and parties may apply to court to vary or discharge the interim measure if there was a subsequent and material change of relevant circumstances. Based on the words 'interim measure', the court may only grant interim measure and not permanent or final relief. As the arbitral tribunal was the
D sole arbiter of the dispute between the parties, that final relief should only be given by the arbitral tribunal in the form of a final award and not by the court (see paras 29–30).

(2) The HCJ had initially allowed and ordered declaratory relief and
E damages as prayed for by the plaintiff. However, the HCJ had subsequently set aside the said orders and then proceeded to vary the same, having acknowledged that the court was not empowered to make such orders. Even though the order had been perfected and issued as the court was sans of jurisdiction to make such final orders, it should not be
F allowed to stand. Thus, this court was in alignment with the HCJ's action to set aside the declaration and damages ordered (see paras 31–32).

(3) The OS and encl 3 'shall not be defeated' by reason of the non-joinder of Hitachi. Furthermore, according to O 1A and O 2 r 1(2) of the Rules of
G Court 2012 ('the ROC') including O 15 r 6(1) of the ROC shall be administered with regard to the 'overriding interest of justice.' The defendant had made a similar call on the BG given by Hitachi and the call was not contested by Hitachi. Therefore, the defendant had not suffered any prejudice due to the non-joinder of Hitachi (see paras 37–38).

H (4) The court had wide powers and discretion to grant interim measures before or during arbitral proceeding pursuant to s 11(1) of the AA . The reasoning of the court's interim measures however did not bind the arbitral tribunal nor were parties bound or estopped in the arbitral
I proceedings by the reasoning of the court (see para 46).

(5) The HCJ had correctly applied the relevant test for the injunction to be granted, namely, whether there was a seriously arguable case that call was fraudulent or unconscionable. The HCJ was not plainly wrong in finding that the conduct of the defendant relating to the calls made on the two

BGs, was one that was 'so reprehensible or lacking in good faith' and 'of such degree such as to prick the conscience of a reasonable and sensible man' (see *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1). Hence, this court was in concurrence with the HCJ's findings and rulings and in the circumstances, the plaintiff's Appeal 551 and Appeal 552 were both dismissed (see paras 64 & 66–67).

(6) On the plaintiff's submission that both encls 28 and 35 should be dismissed as the court was then functus officio because the order had been sealed and perfected by the court, although the HCJ did make such ruling on unconscionability, the said ruling/order was subsequently set aside by the HCJ having acknowledged the position that the court was not empowered to rule/order as such. Hence, the court was not persuaded by the plaintiff's submission on the issue of functus officio. Further, one of the reliefs prayed for by the plaintiff in encls 1 and 3 and which were allowed by the court was that 'either party has the liberty to apply to this Honourable Court for any further orders and/or reliefs'. What was applied for by the defendant vide encls 28 and 35 were in furtherance of the aforesaid prayer. Thus, the point on functus officio was misconceived and without merit (see paras 70 & 77–78).

(7) The ground of HCJ in imposing the condition on the plaintiff pertaining to the two injunctions not wrong. There was a less risk of injustice to both the plaintiff and defendant with the imposition of the conditions because the defendant was restrained by the two injunctions from receiving the proceeds on the two BG's pending the commencement and disposal of the arbitration and if the final award did not favour the defendant, the defendant could still enforce the two BG's. Thus, the court was in concurrence with the HCJ's ruling and there was no merit in the plaintiff's Appeal 579 and Appeal 581 (see para 79).

(8) The HCJ was correct in ruling that based on the arbitration agreement between the parties, which provided for any dispute regarding the contract shall be decided by way of arbitration, the merits of the dispute could only be decided by an arbitral tribunal and not the court. Thus, it was only right to stay the execution of the conditions. In the circumstances, the HCJ was not plainly wrong in allowing encls 28 and 35. Therefore, the was no merit in Appeal 579 and Appeal 581 (see para 82).

[Bahasa Malaysia summary

Plaintif ('KNM Process System') dan Hitachi Zosen Corp of Japan ('Hitachi') membentuk Konsortium bernama SHK Consortium ('Konsortium'). Konsortium telah dianugerahkan kontrak oleh defendan ('Cypark Sdn Bhd') untuk perolehan, pembinaan dan pentauliahan loji rawatan dan pengurusan

A sisa pepejal di Negeri Sembilan ('kontrak tersebut'). Di bawah kontrak itu: (a) plaintif bertanggungjawab ke atas 'bahagian darat' kontrak manakala Hitachi bertanggungjawab untuk 'bahagian luar pesisir'; dan (b) Konsortium dikehendaki menyediakan dua jaminan bank ('JB') kepada defendan, iaitu: (i) 'jaminan bayaran pendahuluan' ('APG') dalam jumlah RM13.3 juta; dan B (ii) 'jaminan prestasi' ('PG') untuk jumlah RM13.3 juta. Kontrak itu juga memperuntukkan klausa timbang tara di mana pihak bersetuju bahawa semua pertikaian di bawah kontrak hendaklah ditentukan melalui timbang tara. Semasa kerja-kerja penggalian, plaintif menemui batu keras cetek di tapak kerja yang menghalangnya daripada meneruskan kerja-kerja dan C menyebabkan kelewatan kepada kerja-kerja seperti yang dijadualkan. Plaintif memalumkan defendan tentang isu batu keras tersebut dan memohon lanjutan masa ('LM') tetapi ditolak oleh defendan. Defendan kemudiannya mengenakan ganti rugi untuk kelewatan berjumlah RM12,150,000 ('ganti rugi kelewatan'). Plaintif mempertikaikan tuntutan defendan untuk ganti rugi D kelewatan. Oleh itu, Konsortium memutuskan untuk menggantung kerja di bawah kontrak ('notis penggantungan'). Ia adalah pendapat plaintif bahawa disebabkan oleh ganti rugi kelewatan, plaintif tidak dapat membayar sub-kontraktor, pembekal dan perundingnya. Berikutan itu, plaintif telah membuat 'aturan pendahuluan tambahan' dengan defendan ('aturan') di mana E defendan membayar sejumlah RM1,747,791.42 kepada plaintif, yang jumlahnya dibayar terus kepada subkontraktor, pembekal dan perunding plaintif mengikut aturan. Akibatnya, defendan mendakwa bahawa penggantungan kerja oleh plaintif sama dengan pelanggaran kontrak oleh Konsortium. Oleh itu, defendan telah menamatkan kontrak, menutup tapak F kerja dan mengeluarkan panggilan ke atas kedua-dua JB. Berikutan daripada panggilan itu, plaintif memulakan ('SP') di mana, melalui lampiran 1, plaintif memohon deklarasi bahawa panggilan yang dibuat adalah tidak wajar dan untuk injunksi untuk menghalang defendan daripada menerima hasil daripada JB yang dipanggil sementara menunggu pelupusan prosiding timbang tara G antara pihak-pihak. Sementara menunggu penentuan lampiran 1, melalui lampiran 3 plaintif, menurut s 11(1)(a) dan/atau (b) Akta Timbang Tara 2005 ('AT'T') memohon secara ex parte satu injunksi untuk menghalang defendan daripada membuat sebarang panggilan ke atas dua JB atau secara alternatif, daripada menerima sebarang hasil daripada JB yang dipanggil. HCJ H membenarkan kedua-dua lampiran 1 dan 3. Tidak berpuas hati, defendan merayu terhadap keputusan tersebut dan memfailkan lampiran 28 memohon perintah supaya plaintif melanjutkan kesahihan dan kebolehkuatkuasaan kedua-dua JB sehingga tiga bulan selepas pelupusan akhir rayuan defendan, sekiranya gagal. yang mana injunksi dan deklarasi (tidak bertimbang rasa) I hendaklah disifatkan sebagai dilepaskan. Defendan juga memfailkan lampiran 35 memohon relif yang serupa dengan lampiran 28, kecuali, supaya kesahihan dan kebolehkuatkuasaan kedua-dua JB dilanjutkan sehingga tiga bulan selepas award timbang tara terakhir antara pihak-pihak, jika gagal kedua-dua injunksi dan deklarasi itu hendaklah dianggap telah dilepaskan dan sementara

menunggu pengeluaran award akhir, kedua-dua pihak mempunyai kebebasan untuk memohon kepada mahkamah ini untuk sebarang perintah selanjutnya. Mahkamah Tinggi membenarkan lampiran 28 dan 35. Terkilan, dengan keputusan Mahkamah Tinggi, kedua-dua plaintif dan defendan merayu. Berkenaan dengan lampiran 28 dan 35, Rayuan 551 dan Rayuan 552 masing-masing difailkan oleh plaintif. Sementara berkenaan dengan lampiran 1 dan 3, Rayuan 579 dan Rayuan 581 telah difailkan oleh defendan. Isu yang timbul untuk penentuan adalah: (A) sama ada mahkamah boleh memerintahkan deklarasi dan/atau ganti rugi di bawah s 11(1) ATT; (B) sama ada plaintif boleh memfailkan SP tanpa memasukkan Hitachi sebagai plaintif bersama; (C) sama ada mahkamah boleh dan patut memberikan injunksi sementara menunggu pengeluaran award akhir; (D) jika mahkamah memberikan dua injunksi sementara menunggu pengeluaran award akhir, boleh dan harus mahkamah mengenakan syarat; dan (E) sama ada menunggu pelupusan rayuan plaintif, mahkamah harus menggantung pelaksanaan syarat itu.

Diputuskan, menolak rayuan:

(1) HCJ melihat dengan betul bahawa kuasa mahkamah untuk memberikan langkah interim terhad kepada mana-mana satu atau lebih s 11(a) hingga (e) ATT dan bahawa penggunaan perkataan 'boleh' menunjukkan bahawa mahkamah mempunyai budi bicara untuk memberikan apa-apa 'langkah interim', 'sebelum atau semasa prosiding timbang tara' dan pihak-pihak boleh memohon kepada mahkamah untuk mengubah atau melepaskan langkah sementara itu jika terdapat perubahan berikutnya dan material keadaan yang berkaitan. Berdasarkan perkataan 'langkah interim', mahkamah hanya boleh memberikan langkah sementara dan bukannya pelepasan kekal atau muktamad. Memandangkan tribunal timbang tara adalah satu-satunya penimbang tara bagi pertikaian antara pihak-pihak, pelepasan muktamad hanya perlu diberikan oleh tribunal timbang tara dalam bentuk award muktamad dan bukan oleh mahkamah (lihat perenggan 29–30).

(2) HCJ pada mulanya telah membenarkan dan memerintahkan pelepasan deklarasi dan ganti rugi seperti yang dimohon oleh plaintif. Bagaimanapun, HCJ kemudiannya telah mengenepikan perintah tersebut dan kemudian meneruskan untuk mengubahnya, setelah mengakui bahawa mahkamah tidak diberi kuasa untuk membuat perintah sedemikian. Walaupun perintah itu telah disempurnakan dan dikeluarkan kerana mahkamah tidak mempunyai bidang kuasa untuk membuat perintah muktamad tersebut, ia tidak sepatutnya dibiarkan berlarutan. Justeru, mahkamah ini selari dengan tindakan HCJ mengetepikan deklarasi dan ganti rugi yang diperintahkan. (lihat perenggan 31–32).

(3) SP dan lampiran 3 'tidak boleh ditolak' oleh sebab ketidakgabungan Hitachi. Tambahan pula, menurut A 1A dan A 2 k 1(2) Kaedah-Kaedah Mahkamah 2012 ('KKM') termasuk A 15 k 6(1) KKM hendaklah ditadbirkan berkenaan dengan 'demi kepentingan keadilan.' Defendan telah membuat panggilan serupa terhadap JB yang diberikan oleh Hitachi dan panggilan itu tidak dibantah oleh Hitachi. Oleh itu, defendan tidak mengalami apa-apa prejudis kerana tidak ketidakgabungan Hitachi (lihat perenggan 37–38).

(4) Mahkamah mempunyai kuasa dan budi bicara yang luas untuk memberikan langkah sementara sebelum atau semasa prosiding timbang tara menurut s 11(1) ATT. Alasan tindakan sementara mahkamah bagaimanapun tidak mengikat tribunal timbang tara mahupun pihak terikat atau dihentikan dalam prosiding timbang tara dengan alasan mahkamah (lihat perenggan 46).

(5) HCJ telah menggunakan ujian yang berkaitan dengan betul untuk injunksi yang akan diberikan, iaitu, sama ada terdapat kes yang boleh dipertikaikan secara serius bahawa panggilan itu adalah penipuan atau tidak wajar. HCJ tidak secara nyata salah dalam mendapati bahawa kelakuan defendan berkaitan dengan panggilan yang dibuat ke atas kedua-dua JB, adalah salah satu yang 'sangat tercela atau tidak mempunyai niat baik' dan 'sebegitu rupa seperti menusuk hati nurani seseorang. manusia yang munasabah dan waras' (lihat *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1). Oleh itu, mahkamah ini selaras dengan dapatan dan keputusan HCJ dan dalam keadaan tersebut, rayuan plaintif 551 dan Rayuan 552 kedua-duanya ditolak (lihat perenggan 64 & 66–67).

(6) Mengenai hujahan plaintif bahawa kedua-dua lampiran 28 dan 35 hendaklah ditolak kerana mahkamah pada masa itu berfungsi secara rasmi kerana perintah itu telah dimeterai dan disempurnakan oleh mahkamah, walaupun HCJ telah membuat keputusan itu atas dasar tidak bertimbang rasa, keputusan/perintah tersebut kemudiannya diketepikan oleh HCJ setelah mengakui kedudukan bahawa mahkamah tidak diberi kuasa untuk memutuskan/perintah sedemikian. Oleh itu, mahkamah tidak diyakinkan dengan hujahan plaintif mengenai isu functus officio. Selanjutnya, salah satu relif yang dimohon oleh plaintif dalam lampiran 1 dan 3 dan yang dibenarkan oleh mahkamah ialah 'mana-mana pihak mempunyai kebebasan untuk memohon kepada Mahkamah Yang Mulia ini untuk sebarang perintah dan/atau relif selanjutnya'. Apa yang dipohon oleh defendan melalui lampiran 28 dan 35 adalah untuk meneruskan perintah tersebut di atas. Oleh itu, perkara mengenai functus officio telah disalah anggap dan tanpa merit (lihat perenggan 70 & 77–78).

(7) Alasan HCJ mengenakan syarat kepada plaintif berkaitan dengan dua

injunksi itu tidak salah. Terdapat kurang risiko ketidakadilan kepada kedua-dua plaintif dan defendan dengan pengenaan syarat kerana defendan telah dihalang oleh kedua-dua injunksi daripada menerima hasil ke atas kedua-dua JB sementara menunggu permulaan dan pelupusan timbang tara dan jika award akhir berjaya tidak memihak kepada defendan, defendan masih boleh menguatkuasakan kedua-dua JB. Oleh itu, mahkamah bersetuju dengan keputusan HCJ dan tiada merit dalam Rayuan plaintif 579 dan Rayuan 581 (lihat perenggan 79).

(8) HCJ adalah betul dalam memutuskan bahawa berdasarkan perjanjian timbangtara antara pihak-pihak, yang memperuntukkan sebarang pertikaian mengenai kontrak itu hendaklah diputuskan melalui timbang tara, merit pertikaian itu hanya boleh diputuskan oleh tribunal timbang tara dan bukannya mahkamah. Oleh itu, adalah wajar untuk mengekalkan pelaksanaan syarat. Dalam keadaan itu, HCJ tidak secara nyata salah dalam membenarkan lampiran 28 dan 35. Oleh itu, tiada merit dalam Rayuan 579 dan Rayuan 581 (lihat perenggan 82).]

Cases referred to

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241, SC (refd)

American Cynamid Co v Ethicon Ltd [1975] AC 396, HL (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257; [2003] 4 CLJ 1, FC (refd)

Malayan Banking Bhd v Gan Bee San & Ors and another appeal (SKS Foam (M) Sdn Bhd, intervener) [2019] 2 MLJ 137; [2019] 1 CLJ 575, FC (folld)

Mohd Hairie Haiqal Bhadif Sagas v Mohd Zani bin Che Din & Ors [2020] MLJU 397; [2020] AMEJ 260, HC (folld)

Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd [2012] 4 MLJ 1, FC (refd)

Legislation referred to

Arbitration Act 2005 s 11, 11(1), (1)(a), (1)(b), (1)(c), (1)(d), (1)(e)
Courts of Judicature Act 1964 s 73
Rules of Court 2012 O 1A , O 2 r 1(2), O 15, O 15 r 6(1), O 29 r 1

Appeal from: *KNM Process Systems Sdn Bhd v Cypark Sdn Bhd* [2020] 10 MLJ 321 (High Court, Shah Alam)

Ahmad Zaidi JCA:

INTRODUCTION

[1] The parties herein shall be referred to as they were before the High Court in Originating Summons No BA-24C(ARB)-2–02 of 2020 ('the OS').

[2] This judgment covers four appeals before this court which were heard together. The four appeals emanated from the decisions of the Shah Alam High Court dated 23 March 2020 (for encls 1 and 3) and 28 March 2020 (for encls 28 and 35) in the OS abovementioned. Enclosures 1 and 3 are the plaintiff's applications. Whereas, encls 28 and 35 are the defendant's.

[3] Enclosures 1, 3, 28 and 35 are interrelated as they pertained to the same subject matter viz, two bank guarantees ('the BGs') issued by the plaintiff to the defendant, pursuant to a building contract awarded by the defendant to the plaintiff. The BGs were subsequently subjected to calls made by the defendant. The plaintiff challenged the validity of the calls.

[4] Fast forward, the learned High Court judge ('HCJ') allowed all the four applications respectively. Dissatisfied, the plaintiff and the defendant appealed to the Court of Appeal against the decisions of the HCJ. Hence, the four appeals herein. The four appeals are:

(a) Civil Appeal No B-02(C)(A)-551–03 of 2020 ('Appeal 551') filed by the plaintiff in respect of encl 28;

(b) Civil Appeal No B-02(IM)(C)-552–03 of 2020 ('Appeal 552') also filed by the plaintiff, in respect of encl 35;

(c) Civil Appeal No B-02(C)(A)-579–04 of 2020 ('Appeal 579') lodged by the defendant in respect of encl 1; and

(d) Civil Appeal No B-02(C)(A)-581–04 of 2020 ('Appeal 581') also by the defendant in respect of encl 3.

[5] The HCJ had prepared one common grounds of judgment ('judgment') covering the court's decisions for all the four applications/enclosures abovesaid.

[6] As agreed by both parties, we heard the four appeals together.

OUR DECISIONS AND FINDINGS

[7] Having appraised the records of appeal and having considered the submissions by the learned counsels, we unanimously found no merit in the appeals above mentioned. Hence, we accordingly dismissed each one of them

and upheld the decisions/orders of the High Court.

[8] We dismissed the appeals on the following grounds.

FACTUAL BACKGROUNDS

[9] The plaintiff (KNM Process System) and Hitachi Zosen Corp of Japan (Hitachi) formed a consortium named 'SHK Consortium' ('the Consortium'). Hereinafter, the plaintiff shall interchangeably be referred to as the Consortium. The Consortium was awarded a contract by the defendant (Cypark Sdn Bhd) for the procurement, construction and commissioning of a Solid Waste Treatment and Management plant in Negeri Sembilan ('the contract').

[10] Under the contract, among others:

(a) the plaintiff is responsible for the 'on-shore portion' of the contract (with a total value of RM137,013,083.50) whilst Hitachi is responsible for its 'off-shore portion' (with a value of JPY3,761,355,000); and

(b) the Consortium is required to provide two bank guarantees ('BGs') to the defendant as follows:

(i) an 'Advance Payment Guarantee' (APG) in a sum of RM13.3m issued by BNP Paribas Malaysia Bhd (BNP) to the defendant on 1 November 2016 and would lapse on 31 March 2022; and

(ii) a 'Performance Guarantee' (PG) for an amount of RM13.3m issued by Affin Bank Bhd ('ABB') to the defendant and would lapse on 30 September 2022.

[11] The contract also provided for an arbitration clause whereby parties agreed that all disputes under the contract shall be determined by way of arbitration.

[12] According to the plaintiff, sometime in January 2016, during excavation works, it encountered shallow hard rock at the work site which prevented it from proceeding with works and causing delay to the works as per scheduled. The plaintiff notified the defendant of the hard rock issue and applied for an extension of time ('EOT') but was refused by the defendant. The defendant then imposed damages for the delay totaling RM12.15m ('delay damages').

[13] The plaintiff disputed the defendant's claim for the 'delay damages'. Hence, by letter dated 6 April 2018, the Consortium decided to suspend works under the contract (suspension notice).

[14] According to the plaintiff, due to the delay damages, the plaintiff could not pay its subcontractors, suppliers and consultants. Flowing from that, the plaintiff entered into an 'Additional Advance Arrangement' with the defendant ('arrangement') wherein the defendant paid a sum of RM1,747,791.42 to the plaintiff, the sum of which was paid directly to the plaintiff's subcontractors, suppliers and consultants as per under the arrangement.

[15] The defendant claimed that the suspension of works by the plaintiff tantamount to a breach of the contract by the Consortium. By letter dated 8 February 2020, the defendant terminated the contract. On the following day, on 9 February 2020, the defendant closed the worksite and by letters dated 10 February 2020 to BNP and ABB respectively, the defendant issued calls on the two BGs. The plaintiff disputed the calls made. In a nutshell, the plaintiff contended that the calls were unconscionable and fraudulently made.

Chronology of applications/events before the High Court

[16] As earlier mentioned the subject matter herein concerned two BGs issued by the plaintiff to the defendant pursuant to the contract between the defendant and the plaintiff. The defendant subsequently made calls on the BGs. The calls which were disputed by the plaintiff, triggered the following events before the High Court.

Originating Summons No BA-24C(ARB)–2-02 of 2020

[17] Flowing from the calls, the plaintiff commenced Originating Summons No BA-24C(ARB)-2–02 of 2020 (the OS) whereby, vide encl 1, the plaintiff applied for a declaration that the calls made were unconscionable and for an injunction to restrain the defendant from receiving proceeds of the called BGs pending disposal of arbitration proceeding between the parties.

[18] Pending the determination of encl 1, vide *encl 3* the plaintiff, pursuant to s 11(1)(a) and/or (b) of the Arbitration Act 2005 ('the AA') applied ex parte for an injunction to restrain the defendant from making any call on the two BGs or alternatively, from receiving any proceeds from the called BGs.

Decisions/orders of the High Court for encls 1 and 3

[19] On 14 February 2020 the HCJ granted the ex parte injunction to the plaintiff for encl 3. The HCJ heard both encls 1 and 3 (inter parte) at one go and thereafter allowed both encls 1 and 3 as per Orders dated 23 March 2020 which pronounced as follows:

(a) for encl 3:

ORDER

(Notice of Application (Ex-Parte Injunction) dated 13.2.2020 (Enclosure No. 3)

UPON THE APPLICATION of the Plaintiff AND UPON READING the Notice of Application (Ex-Parte Injunction) dated 13.2.2020 (Enclosure No. 3) ...

IT IS HEREBY ORDERED as follows:

(1) The Defendant, its servants and/or agents are restrained from demanding or receiving the sum guaranteed under the Performance Bank Guarantee No. 06702153310001 dated 30.11.2015 ('PBG') and the Advance Payment Bank Guarantee No. 07101IGK1601144 dated 1.11.2016 ('APBG') pending the issuance of the Final Award in the envisaged arbitral proceedings to be commenced under the Contract No. CSB/L TM/WTE/SHK/225 dated 28.8.2015 entered into between the Defendant and SHK Consortium (a consortium between the Plaintiff and Hitachi Zosen Corporation) ['Arbitration']'.

(2) Alternatively if any sums have been released under any of the APBG and PBG, the Dependent is restrained from utilising or dealing with such sums pending in the issuance of the Final Award in the Arbitration.

(3) The orders made in paragraphs (1) and (2) above ('Injunctions'). are made on the condition that:

(a) The Plaintiff show at all times ensure that the validity period and the enforceability of the APBG and PBG are renewed until the issuance of the Final Award in the Arbitration ('Condition'); and

(b) In the event that the Plaintiff fails to comply with the Condition above, the Injection shall automatically be deemed lapsed, discharged and set aside.

(4) Either party has the liberty to apply to this Honorable Court for any further orders and/or reliefs.

(b) for encl 1:

ORDER

(Originating Summons dated 13.2.2020 (Enclosure No. 1))

UPON THE APPLICATION of the plaintiff AND UPON READING to the Originating Summons dated 13.12.2020 (Enclosure No. 1) ...

IT IS HEREBY ORDERED as follows:

(a) The Defendant is restrained by itself or agent or servants from making any call on the following, pending the issuance of the Final Award in the envisaged arbitral proceedings to be commenced under the contract No. CSB/L TM/WTE/SHK/225 dated 28.8.2015 entered into between the Defendant and SHK Consortium (a consortium between the plaintiff and Hitachi Zosen Corporation ['Arbitration']';

(i) Performance Bank Guarantee No. 06702153310001 dated 30.11.2015 furnished by Affin Bank Berhad in favour of the Dependent ('PBG'); and

(ii) Advanced Payment Bank Guarantee No. 07101IGK1601144 dated 1.11.2016 furnished by BNP Paribas Malaysia Berhad in favour of the Defendant ('APBG').

(b) The defendant is restrained, by itself or agent or servants from receiving any of the proceeds of the of the PBG and APBG pending the issuance of the Final Award in the Arbitration.

(c) The orders referred to in paragraphs (a) and (b) above ['Injunctions'] are made on the condition that:

(i) The plaintiff shall at all times ensure that the validity and the enforceability of the APBG and PBG are renewed until the issuance of the Final Award in the Arbitration ('Condition'); and

(ii) In the event that the Plaintiff fails to comply with the Condition, the Injunctions shall automatically be deemed lapsed, discharged and set aside.

(d) Either party has the liberty to apply to this Honourable Court for any further orders and/or reliefs.

(e) Cost of RM25,000-00 to be paid by the Dependent to the plaintiff with interest of 5% calculated from 23.3.2020 until full payment.

[20] Dissatisfied, the defendant appealed against the decisions abovesaid and on 27 March 2020, the defendant filed encls 28 and 35.

[21] In brief, vide *encl 28*, the defendant applied for an order that the plaintiff extend the validity and enforceability of the two BGs up until three months after the final disposal of the defendant's appeals (Appeals 579 and 581), failing which the injunctions and declaration (unconscionability) abovesaid shall be deemed to be discharged.

[22] As for *encl 35*, the reliefs prayed for are almost identical to that of encl 28, save for, that the validity and enforceability of the two BGs be extended until three months after the final arbitration award between the parties, failing which the two injunctions and declaration shall deemed to be discharged and pending the issuance of the final award, both parties shall have liberty to apply to this court for any further order.

Variation to the order dated 23 March 2020

[23] It bears mention that subsequent to the order dated 23 March 2020 (for encls 1 and 3) aforesaid, both counsels had intimated to the HCJ that the court was actually sans of power to grant final reliefs in the form of a declaration and/or damages as applied for by the plaintiff vide encl 1. This was intimated

to the HCJ before the hearing of encls 28 and 35. Acknowledging the 'slip' abovesaid, the HCJ set aside the said declaratory orders, as stated at paras 33 to 38 of the HCJ's judgment.

Decisions/orders of the High Court for encls 28 and 35

[24] On 28 March 2020 the HCJ allowed encls 28 and 35 abovesaid whilst at the same time varying the order dated 23 March 2020 as follows:

> (i) The orders made by this Court on 23.3.2020 in respect of the Originating Summons dated 13.2.2020 (encl 1), in the form of encl 37 (i.e. sealed order dated 23.3.2020), are entirely varied as follows as per Appendix A which states as follow:
>
> Appendix A
>
> ORDER
>
> (Originating Summons dated 13.2.2020 (Enclosure No. 1)
>
> [17] UPON THE APPLICATION of the Plaintiff AND UPON READING the Originating Summons dated 13.2.2020 (Enclosure No. 1) ... IT IS HEREBY ORDERED as follows:
>
> (a) The Defendant is restrained by itself or agent or servants from making any call on the following, pending the issuance of the Final Award in the envisaged arbitral proceedings to be commenced under the Contract No. CSB/LTM/WTE/SHK/225 dated 28.8.2015 entered into between the Defendant and SHK Consortium (a consortium between the Plaintiff and Hitachi Zosen Corporation) ['Arbitration'];
>
> (i) Performance Bank Guarantee No. 06702153310001 dated 30.11.2015 furnished by Affin Bank Berhad in favour of the Defendant ('PBG'); and
>
> (ii) Advance Payment Bank Guarantee No. 07101IGK1601144 dated 1.11.2016 furnished by BNP Paribas Malaysia Berhad in favour of the Defendant ('APBG').
>
> (b) The Defendant is restrained, by itself or agent or servants from receiving any of the proceeds of the PBG and APBG pending the issuance of the Final Award in the Arbitration.
>
> (c) The orders referred to in paragraphs (a) and (b) above ['Injunctions'] are made on the condition that:
>
> (i) The Plaintiff shall at all times ensure that the validity period and the enforceability of the APBG and PBG are renewed until the issuance of the Final Award in the Arbitration ('Condition'); and
>
> (ii) In the event that the Plaintiff fails to comply with the Condition, the Injunctions shall automatically be deemed lapsed, discharged and set aside.
>
> (d) Either party has the liberty to apply to this Honourable Court for any further orders and/or reliefs.

A (e) Costs of RM25,000-00 to be paid by the Defendant to the Plaintiff with interest of 5% calculated from 23.3.2020 until full payment.

ISSUES

B **[25]** The issues concerning the four applications before the HCJ are:

(i) whether the court can order declarations and/or damages under s 11(1) of the Arbitration Act 2005 ('the AA')?

C (ii) whether the plaintiff can file the OS without including Hitachi Zosen Corp of Japan (Hitachi) as a co-plaintiff?

(iii) whether the court can and should grant the injunctions pending the issuance of the final award?

D (iv) if the court grants the two injunctions pending the issuance of the final award, can and should the court impose condition? and

(v) whether pending the disposal of the plaintiff's appeals, the court should stay the execution of the condition?

E **[26]** The issue before us is whether the HCJ had committed any appealable error regarding the four applications. It bears mention again that, the HCJ allowed all the four applications.

OUR ANALYSIS AND DECISION/RULINGS

F **[27]** We shall first deal with issues (i) and (ii). Issue (i) directly pertained to encls 1 and 3.

Appeals 579 and 581 — Enclosures 1 and 3

G Issue (i) — Whether the court can order declarations and/or damages under s 11(1) of the AA 2005?

H **[28]** To start with, s 11(1) of the AA provides as follows:

> 11 Arbitration agreement and interim measures by High Court.
>
> (1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for the party to —
>
> I (a) maintain or restore the status quo pending the determination of the dispute;
>
> (b) take action that would prevent or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process;

(c) provide a means of preserving assets out of which a subsequent award may be satisfied, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;

(d) preserve evidence that may be relevant and material to the resolution of the dispute; or

(e) provide security for the costs of the dispute.

[29] The HCJ was of the view that the court's power to grant interim measures is confined to any one or more of s 11(1)(a) to (e) abovesaid and that the use of the word 'may' shows that the court has a discretion to grant any 'interim measure', 'before or during arbitral proceedings' and parties may apply to court to vary or discharge the interim measure if there is a subsequent and material change of relevant circumstances. We agreed with the HCJ.

[30] Based on the words 'interim measure' aforesaid, the court may only grant interim measure and not permanent or final relief. As the arbitral tribunal is the sole arbiter of the dispute between the parties, in our view, it goes without saying that final relief should only be given by the arbitral tribunal in the form of a final award and not by the court.

[31] As earlier mentioned, the HCJ had initially via order dated 23 March 2020 allowed and ordered declaratory relief and damages as prayed for by the plaintiff. However, as stated in the foregoing para [23] above mentioned, the HCJ had subsequently set aside the said orders and then proceeded to vary the same, having acknowledged that the court was not empowered to make such orders. The varied order of the court is as per at para [24] abovesaid.

[32] Based on the aforesaid and on the decision in *Malayan Banking Bhd v Gan Bee San & Ors and another appeal (SKS Foam (M) Sdn Bhd, intervener)* [2019] 2 MLJ 137; [2019] 1 CLJ 575 (FC), even though the order dated 23 March 2020 had been perfected and issued as the court is sans of jurisdiction to make such final orders, we agreed with the HCJ that it should not be allowed to stand. Thus, we are in alignment with the HCJ's action to set aside the declaration and damages ordered. As such, in our view, issue (i) is now defunct and academic.

Issue (ii) — Whether the plaintiff can file this OS without including Hitachi as a co-plaintiff?

[33] Learned counsel for the defendant submitted that as the contract was entered into by the Consortium (comprising of plaintiff and Hitachi), the OS (encl 1) should be struck out for the plaintiff's failure to join in Hitachi as a co-plaintiff.

[34] Counsel for the plaintiff contended otherwise. According to counsel the non-joinder of Hitachi as a co-plaintiff is not fatal because firstly the Consortium is not a legal entity. Secondly, the part/portion of the contract involving the plaintiff and Hitachi can easily be identified and separated, whereby Hitachi's part/role concerned specifically to the off-shore portion of the contract whereas, the plaintiff's portion of the contract is confined to the on-shore works. For its portion of the contract, Hitachi had provided its own BG to the defendant. Similarly, a separate BG was provided by the plaintiff to the defendant for its portion of the contract.

[35] The learned HCJ was not with the defendant on this issue. The HCJ opined that the failure to make Hitachi a co-plaintiff in this case to be not wrong/fatal. His Lordship referred to O 15 of the Rules of Court 2012 ('the ROC') and the case of *Mohd Hairie Haiqal Bhadif Sagas v Mohd Zani bin Che Din & Ors* [2020] MLJU 397; [2020] AMEJ 260.

[36] Order 15 provides as follow:

> O 15 — *Misjoinder and non-joinder of parties*
>
> O 15 r 6(1) A cause or matter shall not be defeated by reason of the misjoinder or non-joinder of any party, and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

[37] Based on the abovesaid, we agreed with the HCJ. It is apparently clear to us that the OS and encl 3 'shall not be defeated' by reason of the non-joinder of Hitachi. Furthermore, according to O 1A and O 2 r 1(2) of the Rules of Court 2012 ('the ROC') including O 15 r 6(1) of the ROC shall be administered with regard to the 'overriding interest of justice'.

[38] We are minded that the defendant had made similar call on the BG given by Hitachi (for the off-shore portion of the contract) and the call was not contested by Hitachi. Therefore, we are unable to see how the defendant had suffered any prejudice due to the non-joinder of Hitachi.

[39] Having appraised the HCJ's ruling and reasoning on this point, based on the facts and circumstances herein and by virtue of O 1A, O 2 r 1(2) and O 15 r 6(1) of the ROC and the case of *Mohd Hairie Haiqal Bhadif Sagas v Mohd Zani bin Che Din & Ors* aforementioned, we are of the considered view the OS is not defeated by the non-joinder of Hitachi.

Issue (iii) — Whether the court can and should grant the injunctions pending the issuance of the final award? A

Whether the court can/is empowered to grant the injunctions?

[40] As to whether the court is empowered to grant the injunctions to the plaintiff being a party to an arbitration agreement pending the commencement or disposal of the arbitration between them, the HCJ ruled that the court can grant such injunctions pursuant to s 11(1)(a) to (e) of the AA 2005. B

[41] The HCJ in ruling for the plaintiff on issue (iii) opined as follows at para [32] GOJ: C

> (1) the court has a discretion under s 11(1)(a) and/or (b) of the AA to grant the interim injunction in any one or more of the following three circumstances ('three circumstances'): D
>
> (a) the interim injunction is granted pursuant to s 11(1)(a) of the AA to 'maintain' the status quo pending the disposal of the 'arbitration; and
>
> (b) the interim injunction is ordered under s 11(1)(a) of the AA to 'restore' the status quo pending the disposal of the arbitration. E

[42] Learned counsel for the defendant submitted that the HCJ was wrong. According to counsel since the parties had agreed that any dispute under the contract shall be determined by arbitration, the dispute concerning the validity of calls/demand made by the defendant on the two BGs herein should therefore be made before the arbitrator and not before the court. F

[43] Furthermore, counsel submitted that based on the same argument abovesaid, the plaintiff cannot apply for the injunction against the defendant to restrain the defendant from making the call of the BGs or from receiving any proceeds from the BGs. Flowing therefrom, counsel argued that pending the commencement or disposal of the arbitration, the court has no power to grant injunction to the plaintiff. G

[44] Conversely, counsel for the plaintiff submitted that a party can apply for such injunction under s 11 of the AA 2005. H

[45] The HCJ disagreed with the defendant and is of the view that s 11(1)(a)/or (b) of the AA 2005 empowers the court with discretion to do so. I

[46] Having considered the issue above, we are in concurrence with the finding/ruling of the HCJ. We agreed with the HCJ that the court has wide powers and discretion to grant interim measures before or during arbitral

proceeding pursuant to s 11(1) of the AA 2005. The reasoning of the court's interim measures however does not bind the arbitral tribunal nor are parties bound or estopped in the arbitral proceedings by the said reasoning of the court.

Whether the court should grant the injunctions

[47] Moving on, we will next see if the HCJ, on the facts and in the circumstances of this case, has erred in granting the injunctions herein against the defendant.

The defendant's submission and contention

[48] Learned counsel for the defendant submitted that the plaintiff failed to show a strong prima facie case of unconscionability or mala fide. The learned HCJ has descended deeply into the facts and merits of the dispute which are matters within the realm of the arbitrator.

[49] According to counsel the calls made on the BGs were to enable the defendant to utilize the proceed of the BGs, to complete and to rectify/repair defects in the works of the plaintiff. The calls made are also to enable the defendant to recoup the advance payment made by the defendant to the Consortium. Thus, the calls cannot in the circumstance be unconscionable.

[50] Counsel submitted that the learned HCJ was plainly in error because the BGs were 'Unconditional on Demand Guarantees'. According to counsel the purpose of the BGs is to guarantee the proper completion/execution of the works under the contract by the Consortium.

[51] As to the refusal to grant EOT, counsel stressed that under the contract, there was delay on the part of the Consortium and based on the plaintiff's own admission, a month before the scheduled date for completion, works was only 86.27% completed. Counsel submitted that the refusal to grant EOT to the plaintiff was justified because even if EOT was to be granted, the Consortium would still be unable to complete the works as per the contracted schedule. This is so because the extension asked for by the Consortium was only up until 21 August 2019 and there was still a delay of 171 days on the plaintiff's part until 8 February 2020 (date of defendant's termination of the contract) even if the defendant had granted an EOT.

[52] According to counsel the HCJ did not consider the many breaches and defaults by plaintiff as deposed in the defendant's affidavit and which were not unrebutted by the plaintiff. Due to the breaches and failure by the Consortium, the defendant was constrained to terminate the contract and consequentially to

made demand on the BGs. Hence, counsel submitted that there is nothing unconscionable in the calls made by the defendant. In fact, according to counsel, the fact that Hitachi did not raise any objection to the calls on the BGs proved that the calls/demand made were not unconscionable.

[53] Pertaining to the issue of delayed damages, which the learned HCJ found had constrained the plaintiff to enter into the advanced arrangement with the defendant with unconscionable effect to the plaintiff, counsel submitted that the matter is one to be determined at the arbitration and is irrelevant to whether the demand made on the BGs is unconscionable or not. Nevertheless, counsel contended that the arrangement was not unconscionable because the Consortium had entered into the said arrangement agreement on its freewill. The Consortium was free to walk away but instead chose to enter the same. Based on the foregoing, counsel submitted that the HCJ was in error to grant the injunctions herein since the calls made on the BGs were neither fraudulent nor unconscionable.

[54] Moving on, counsel next submitted that as the subject matter herein is purely monetary, damages are clearly adequate remedy and that the defendant is in a financial position to pay them if so ordered. Counsel referred to *American Cynamid Co v Ethicon Ltd* [1975] AC 396, per Lord Diplock at p 510. According to counsel, purely on this ground, the injunctions ought to be dismissed/set aside.

[55] Next, counsel submitted that the balance of convenience tilted in favour of dismissing/setting aside the injunctions, because the calls made cannot be said to unconscionable because any delay in releasing the BGs proceed to the defendant would deprive its funding to complete the project. On the other hand, no prejudice will be caused to the plaintiff if Appeal 579 and Appeal 581 are allowed as the plaintiff can always recover the BGs and/or BGs proceed/sums at the arbitration.

[56] Premised on the aforesaid counsel submitted Appeal 579 and 581 should to be allowed and the injunctions be dismissed/set aside.

The plaintiff's submission and contention

[57] Conversely, learned counsel for the plaintiff submitted that the HCJ was correct in granting the two injunctions and in finding that the calls were unconscionable and/or fraudulent. The HCJ found that the defendant had deliberately 'engineered' an excuse for the defendant's calls by wrongfully refusing to pay the plaintiff for work done with regard to the onshore portion. The defendant then had unlawfully terminated the contract and defendant's

calls which were designed to prevent the plaintiff from obtaining Work Done Certificates from the defendant in respect of Milestones 10 and 11.

[58] According to the plaintiff, it had completed work in respect of 'Milestone 9' on 14 March 2019. However, the defendant had recommended in 'Work Done Certificate No 12' (Certificate 12) a negative sum of RM21,455,941.30 to the defendant.

[59] Furthermore, counsel submitted that the defendant had also called on the BGs provided by Hitachi. The combined values of Hitachi's BGs are approximately the same as the two BGs. The total for the two BGs and Hitachi's BG's is 53,200,000. According to counsel, the defendant had only paid a total of RM59,496,440.30 to the plaintiff. In other words, if the defendant's two calls are allowed by the court, the defendant would recoup substantially all the payments made by the defendant to the plaintiff.

[60] As regard the EOT, counsel submitted that the HCJ found that 'despite the hard rock problem the defendant refused to grant an EOT to the plaintiff and then imposed delay damages on the plaintiff' and that 'the plaintiff was therefore constrained to enter into the arrangement with the defendant' which, according to the HCJ had unconscionable effect on the plaintiff. Counsel submitted that the HCJ was correct in His Lordship's ruling in allowing the two injunctions. Thus, counsel submitted that Appeals 579 and 581 should be dismissed.

The learned HCJ'S findings

[61] Overall, the learned HCJ was not persuaded by the submission by the defendant's counsel.

[62] In granting the injunctions to the plaintiff as prayed for, the HCJ at paras [32] His Lordship's judgment referred to the Federal Court case of *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1 which held as follows:

> [33] It would seem from the modern authorities we have read, that in the case of on demand letters of guarantee or performance bonds the courts are now more willing to look beyond the fraud exception and consider unconscionability as a separate and independent ground to allow for a restraining order on the beneficiary.
>
> [34] ...
>
> [35] ...
>
> [36] We are also in agreement with Mohamad Ariff bin Md Yusof JC in the case of *Focal Asia Sdn Bhd* when he expressed this opinion on these two exceptions and the test to be applied:

> If there is clear evidence of fraud in the underlying contract, or unconscionability, the court can interfere. In these two situations, the integrity and autonomy of the document will not be compromised, since the paying bank will not be directly prevented from acting on the document. It is the beneficiary that is prevented from making a call on the document on these grounds. Nonetheless, the evidence allowing intervention by the court must be clear. I accept the test of 'seriously arguable that the only realistic inference is fraud' as good law in an interlocutory application such as the present.
>
> [37] ...
>
> [38] ...
>
> [39] We are of the considered view that the 'seriously arguable and realistic inference' test as used by the learned judicial commissioner in *Focal Asia* is equally applicable to the extended exception of unconscionability. That test therefore needs to be applied to the relevant material facts before the court. The same test which results in a 'strong prima facie case' was utilised by the Court of Appeal at the intermediate appeal said this of the required burden now rested on the shoulder of Sumatec:
>
> > As in the case of fraud, to establish 'unconscionability' there must be placed before the court manifest or strong evidence of some degree in respect of the alleged unconscionable conduct complained of, not a bare assertion. Hence, the respondent has to satisfy the threshold of a seriously arguable case that the only realistic inference is the existence of 'unconscionability' which would basically mean establishing a strong prima facie case. In other words, the respondent has to place sufficient evidence before the court so as to enable the court to be satisfied, not necessarily beyond reasonable doubt, that a case of 'unconscionability' being committed by the beneficiary (the appellant) has been established to an extent sufficient for the court to be minded to order injunction sought. This additional ground of 'unconscionability' should only be allowed with circumspect where events or conduct are of such degree such as to prick the conscience of a reasonable and sensible man. We are in agreement with those propositions.

[63] According to the learned HCJ there are four possible grounds opened for the plaintiff to challenge the calls on a BGs, namely that the calls were:

(a) fraudulently done;

(b) unconscionable;

(c) contrary to the contract between the parties; and/or

(d) do not comply with the BGs.

[64] The HCJ ruled that the plaintiff had succeeded in fulfilling the tests for the injunction to be granted, which are:

(a) a valid and arguable cause of action against the defendant (cause of action);

(b) the existence of one or more of the three circumstances/status quo;

(c) a seriously arguable case that call is fraudulent or unconscionable;

(d) the remedy of damages is not an adequate remedy;

(e) the 'balance of convenience' or the 'balance of justice' lies in favour of the granting the injunction;

(f) an undertaking to pay damages (undertaking);

(g) compliance with all the procedural requirements as laid down in O 29 r 1 of the RC; and

(h) no policy or equitable consideration against the grant of the injunction.

[65] The HCJ made the following rulings/findings in respect of the tests above mentioned:

(a) a valid and arguable cause of action — the HCJ found that the plaintiff has a valid and arguable cause of action against defendant for breach of the contract, for imposing delay damages and in unlawfully terminating the contract;

(b) status quo — according to the HCJ the two injunctions are necessary to maintain the status quo pending the commencement and disposal of the Arbitration because the defendant's two calls have already been made on BNP and ABB. If status quo is not maintained current or imminent harm or prejudice to the arbitration is likely to be caused. The HCJ referred to s 11(1)(b) of the AA;

(c) serious arguable case — firstly, according to the HCJ despite the hard rock problem encountered by the plaintiff, the fact of which was relayed to the defendant, the defendant refused to grant an EOT to the plaintiff and had instead imposed delay damages on the plaintiff. Secondly, although the plaintiff had completed work for Milestone 9, the defendant did not recommend any payment for it (in Certificate 12) but proceeded to claim delay damages instead. Thus, the plaintiff was deprived of payment under the contract. Consequentially, the plaintiff could not pay its subcontractors, suppliers and consultants. The plaintiff was therefore constrained to enter into the advance arrangement with the defendant. According to the HCJ if not for the arrangement, the plaintiff would have been entitled to seek for a release of the BG (APG) from the defendant. Thirdly, the defendant refused to issue Work Done Certificates for work for Milestones 10 and 11 and had also called on Hitachi's BG's. According to the HCJ, the combined value for the two BG's and Hitachi's BG's is RM53.2m. The effect would be that the

defendant world have recouped substantially all the payments made by the defendant to the plaintiff even before the commencement of the Arbitration. Hence, the HCJ was satisfied that the sequence of events and the defendant's conduct abovesaid pricks the 'conscience of a reasonable and sensible' person. Premised on the aforesaid, the HCJ was of the view that it is only realistic to infer that the defendant's two calls are unconscionable as against the plaintiff;

(d) damages not being sufficient remedy — the HCJ disagreed with the submission by the defendant's counsel that damages are sufficient remedy herein, for the court to dismiss the injunctions. The HCJ opined that damages are not an adequate relief for the plaintiff in this case. Firstly, in view of the defendant's conduct as explained in the foregoing paragraph, the plaintiff had been deprived of cash flow. In fact, the defendant's conduct in this case had caused the plaintiff to resort to the arrangement for the defendant to pay the plaintiff's subcontractors, suppliers and consultants. If the two injunctions are not granted to preserve the status quo pending the commencement and disposal of the arbitration, the plaintiff will suffer irreparable prejudice by not being financially able to commence and dispose of the arbitration. In other words, if the two injunctions are not ordered in this case, the defendant would have 'won by default' even before the commencement of the arbitration. In that instance, the HCJ was of the view that damages would not be sufficient remedy;

(e) balance of convenience — learned counsel for the defendant submitted that the balance of convenience tilted in favour of dismissing the injunctions, firstly because the calls made cannot be said to unconscionable and secondly, due to the non-joinder of Hitachi to this action, as alluded to and submitted by the defendant earlier on. The learned HCJ was not persuaded by the defendant's contention. On this point, the HCJ referred to *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 (SC) and was of the view that the balance of convenience lies in favour of granting the two injunctions. According to the HCJ if the injunction is not granted (with condition), there will be grave injustice to both the parties and that there is less risk of injustice to both the plaintiff and defendant because if the final award favours the defendant, the defendant can still enforce the two BG's and pending the final award the defendant is restrained from receiving the proceeds on the two BG's, thus at the same time safeguarding the plaintiff's rights;

(f) undertaking by the plaintiff — in view of the conditions imposed on the plaintiff, the HCJ exercised His Lordship's discretion to exempt the plaintiff from furnishing any undertaking for the two injunctions;

(g) compliance with procedural requirements — the HCJ was satisfied that

A the plaintiff had fulfilled all the requirements of O 29 r 1 of the ROC; and

(h) public policy and equity — the HCJ found that, there is no policy or equitable consideration against the granting of the two injunctions.

B **[66]** Having appraised the issues aforesaid, in our view the HCJ has correctly applied the relevant test for issue (iii) herein. The HCJ had aptly addressed and had correctly applied the test for injunction. The learned HCJ had cogently support His Lordship's rulings. In our view, the learned HCJ was not plainly wrong in finding that, view wholly the facts and circumstances of the case, the C conduct of the defendant relating to the calls made on the two BGs, is one that is, as said by Abdull Hamid bin Embong FCJ in *Sumatec Engineering*, 'so reprehensible or lacking in good faith' and 'of such degree such as to prick the conscience of a reasonable and sensible man'.

D **[67]** Hence, we are in concurrence with the HCJ's findings and rulings in respect of issue (iii). The defendant failed to show any appealable error or that the HCJ was plainly wrong. We find no merit in the plaintiff's Appeals 551and 552. We would therefore, dismissed both Appeals.

E *Appeals 579 and 581 — Enclosures 28 and 35*

[68] Next, we shall deal with issues (v) and (vi). Issue (v) relates to Appeals 579 and 581 by the plaintiff, in respect of encl 28 and 35 respectively.

F Issue (v) — Whether pending the issuance of the final award, the court can impose condition in respect of the injunctions?

[69] The HCJ allowed both of the defendant's applications vide encls 28 and 35 and had ordered the plaintiff to ensure the validity and enforceability of the G two BGs to be extended until the final disposal of the arbitration between the parties (encl 28) and/or the disposal of the appeals herein (encl 35), failing which the two injunctions shall be extinguished.

The plaintiff's submission

H

[70] Learned counsel for the plaintiff submitted that both encls 28 and 35 should be dismissed as the court was then functus officio because the order dated 23 February 2020 had been sealed and perfected by the court on 28 March 2020.

I

[71] Learned counsel further submitted that the HCJ failed to adequately consider he prejudice on the plaintiff in making the orders in respect of the two enclosures aforesaid. By imposing the conditions, the HCJ had placed the plaintiff in a worse position and made to suffer further, more so because the

issuing banks had required full coverage for the value of the renewed BGs. Counsel further added that to compel the plaintiff to renew/extend the BGs would in fact alter the status quo rather than preserving them.

[72] Premised on the above, counsel prayed for Appeals 551 and 552 be allowed.

The defendant's submission

[73] Counsel submitted that the plaintiff's counsel argument that the court was functus officio is flawed because the doctrine of 'functus officio' does not apply when an order made is irregular, null or void due to lack of jurisdiction as held by the Federal Court in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 at pp 76 and 117 and *Malayan Banking Bhd v Gan Bee San & Ors and another appeal (SKS Foam (M) Sdn Bhd, intervener)* [2019] 2 MLJ 137; [2019] 1 CLJ 575.

Decision/findings of the High Court

[74] At para 54 of His Lordship's judgment, the HCJ opined as follows:

> I am of the view that in the exercise of the court's discretion to grant the appropriate interim measure under s 11(1)(a) to (e) of the AA, the court may impose any condition in the interest of justice with regard to the interim measure. There is nothing in s 11(1)(a) to (e) of the AA which prevents the court from attaching any condition to the interim measure to be ordered by the court. More importantly, the purpose of the interim measure to be granted by the court pursuant to s 11(1)(a) to (e) of the AA may be attained by way of the court's imposition of a specific condition with regard to the interim measure in question. Hence, a literal and purposive construction of s 11(1)(a) to (e) of the AA support the court's discretionary power to attach any just condition to the interim measure to be ordered by the court.

[75] The HCJ was of the view that defendant would be prejudiced if the validity of the two BGs were not extended. At para [56] of His Lordship's judgment, the HCJ held as follows:

> The condition does not cause any injustice to the plaintiff because this OS cannot relieve the plaintiff's obligations to furnish the two BG's under the contract. As stated in the above sub-para 31(6), the court can only grant interim relief under s 11(1)(a) and/or (b) of the AA in this OS. This court cannot therefore grant any final relief in the form of an exemption of the plaintiff's obligations to furnish the two BG's under the contract. I am unable to see how the condition oppresses the plaintiff in any manner when the plaintiff has agreed in the contract to furnish the two BG's in favour of the defendant.

[76] Counsel for the plaintiff submitted that the condition compelling the

plaintiff to extend the BGs is oppressive. Counsel submitted that there is no legal basis for the HCJ to conclude that the defendant would be prejudiced if the BGs were not extended. Counsel further submitted that the defendant has failed to show special/exceptional circumstances to warrant extension of the BGs, especially in this case whereby the HCJ had made clear finding that the calls made by the defendant were unconscionable.

[77] With respect we are unable to agree with the plaintiff's counsel on this point. Although the HCJ did make such ruling on unconscionability, the said ruling/order was subsequently set aside by the HCJ having acknowledged the position that the court was not empowered to rule/order as such then.

[78] We are also not persuaded by the plaintiff's submission on the issue of functus officio. It bears mention that one of the reliefs prayed for by the plaintiff in encls 1 and 3 and which were allowed by the court is that 'either party has the liberty to apply to this honorable court for any further orders and/or reliefs'. We are of the view that what was applied for by the defendant vide encls 28 and 35 are in furtherance of the aforesaid prayer. Thus, in our view the point on functus officio, in the circumstances, is misconceived and without merit.

[79] Having considered the submissions aforesaid, we are of the view that the ground of HCJ in imposing the condition on the plaintiff pertaining to the two injunctions not wrong. We agreed with the HCJ that there is a less risk of injustice to both the plaintiff and defendant with the imposition of the conditions because the defendant is restrained by the two injunctions from receiving the proceeds on the two BG's pending the commencement and disposal of the arbitration and if the final award does not favour the defendant, the defendant can still enforce the two BG's. Thus, we are in concurrence with the HCJ's ruling herein and find no merit in the plaintiff's appeals 579 and 581.

Issue (vi) — Whether pending the disposal of the plaintiff's appeals, the court can stay the execution of the condition?

[80] The HCJ rejected the stay application by the plaintiff of the conditions imposed, pending the disposal of the plaintiff's appeals for want of special circumstances. The HCJ found that the plaintiff failed to show the existence of any special circumstances with regard to the execution of the condition. The HCJ referred to s 73 of the Courts of Judicature Act ('the CJA') and the case of *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1. Section 73 of the CJA reads: 'An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders and no

intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct'.

[81] From the judgment, we find that the learned HCJ had fully appraised the abovesaid facts and of the legal position and had correctly applied the principles pertaining to s 11 of the AA. The HCJ had reminded himself of the relevant legal principles and having regard to the facts of the case, the learned HCJ found as a fact that the calls on the BGs by the defendant were unconscionable as per at para 42 GOJ wherein the learned HCJ held as follows:

> 42. This court is satisfied that despite the defendant's many averments as elaborated in the above para 7, there is a 'seriously arguable case that the only realistic inference' is the defendant's two calls are unconscionable as against the plaintiff. This decision is premised on the following evidence and reasons:
>
> (1) despite the Hard Rock Problem:
>
> (a) the defendant refused to grant an EOT to the plaintiff; and
>
> (b) the defendant imposed delay damages on the plaintiff.
>
> (2) as a result of the delay damages:
>
> (a) the plaintiff had completed work for Milestone 9 but the defendant did not recommend any payment for Milestone 9 in Certificate 12 because the defendant had purportedly claimed for delay damages.
>
> (3) the arrangement had the following unconscionable effect on the plaintiff:
>
> (a) if not for the arrangement, the plaintiff would have been entitled to seek for a release of the BG (APG) from the defendant;
>
> (b) the arrangement allowed the defendant to take over effectively the performance on the Onshore Portion from the plaintiff.
>
> (4) the plaintiff had completed work for Milestone 10 and 11, However, the defendant refused to issue Work Done Certificates for Milestones 10 and 11 because the defendant had purportedly terminated the contract; and
>
> (5) the defendant had also called on Hitachi's BG's. The combined value for the two BG's and Hitachi's BG's is RM53.2m. The defendant had only paid a total of RM59,496,440.30 to the plaintiff)excluding the defendant's payments to plaintiff's creditors (arrangement) and delay damages). If the court does not grant the two injunctions in this case, the defendant would have recouped substantially all the payments made by the defendant to the plaintiff even before the commencement of the arbitration.
>
> 43. Additionally or alternatively, I am persuaded by the evidence and reasons stated in the above para 42 that there exists a 'strong prima facie case' that the defendant's two calls are unconscionable.

A 44. Lastly, this court is satisfied that the sequent of events and the defendant's conduct as explained in the above para 42 cannot be co-incidental but are of such a nature and degree which pricks the 'conscience of a reasonable and sensible' person.

B **[82]** In concluding, the learned HCJ ruled that based on the arbitration agreement between the parties, which provides for any dispute regarding the contract shall be decided by way of arbitration, the merits of the dispute can only be decided by an arbitral tribunal and not the court. Thus, it is only right to stay the execution of the conditions. We agreed with the learned HCJ's ruling abovementioned. In the circumstances, it is our finding that the HCJ is C not plainly wrong in allowing encls 28 and 35 as such. We find no merit in Appeals 579 and 581.

Appeals dismissed.

D Reported by K Selvaraju

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